



**Cynulliad Cenedlaethol Cymru
The National Assembly for Wales**

**Y Pwyllgor Is-ddeddfwriaeth
The Subordinate Legislation Committee**

**Dydd Llun, 13 Gorffennaf 2009
Monday, 13 July 2009**

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Cofnodir y trafodion hyn yn yr iaith y llefarwyd hwy ynndi yn y pwyllgor. Yn ogystal,
cynhwysir cyfieithiad Saesneg o gyfraniadau yn y Gymraeg. Mae hon yn fersiwn ddrafft o'r
cofnod. Cyhoeddir fersiwn derfynol ymhen pum diwrnod gwaith.

These proceedings are reported in the language in which they were spoken in the committee.
In addition, an English translation of Welsh speeches is included. This is a draft version of the
record. The final version will be published within five working days.

Aelodau'r pwyllgor yn bresennol
Committee members in attendance

Alun Davies	Llafur Labour
Michael German	Democratiaid Rhyddfrydol Cymru Welsh Liberal Democrats
David Melding	Ceidwadwyr Cymreig Welsh Conservatives
Janet Ryder	Plaid Cymru (Cadeirydd y Pwyllgor) The Party of Wales (Committee Chair)

Eraill yn bresennol
Others in attendance

Tamsin Brown	Rheolwr Caniatadau Morol Marine Consents Manager
Sean Bradley	Cyfreithiwr Lawyer
Rachael Clancy	Cyfreithiwr Lawyer
Jane Davidson	Aelod y Cynulliad, Llafur (y Gweinidog dros Amgylchedd, Cynladwyedd a Thai) Assembly Member, Labour (the Minister for Environment, Sustainability and Housing)
Stuart Evans	Pennaeth Polisi Pysgodfeydd Head of Fisheries Policy
Louise George	Uwch-swyddog Polisi Morol Senior Marine Policy Officer
Elin Jones	Aelod y Cynulliad, Llafur (y Gweinidog dros Faterion Gwledig) Assembly Member, Labour (the Minister for Rural Affairs)

Swyddogion Cynulliad Cenedlaethol Cymru yn bresennol
National Assembly for Wales officials in attendance

Bethan Davies	Clerc Clerk
Gwyn Griffiths	Uwch-gynghorydd Cyfreithiol Senior Legal Adviser
Joanest Jackson	Uwch-gynghorydd Cyfreithiol Senior Legal Adviser
Olga Lewis	Dirprwy Glerc Deputy Clerk
Lisa Salkeld	Cynghorydd Cyfreithiol Legal Adviser

Dechreuodd y cyfarfod am 4.46 p.m.
The meeting began at 4.46 p.m.

Cyflwyniad, Ymddiheuriadau, Dirprwyon a Datgan Buddiannau
Introduction, Apologies, Substitutions and Declarations of Interest

[1] **Janet Ryder:** I welcome Members, officials and members of the public. In an emergency, ushers will indicate the nearest safe exit. Headsets are available and I remind Members to switch off all mobile phones. We have received an apology for absence from Joyce Watson.

4.46 p.m.

Offerynnau na Fydd y Cynulliad yn Cael ei Wahodd i Roi Sylw Arbennig Iddynt o dan Reol Sefydlog Rhif 15.2 ac Offerynnau sy'n Agored i Gael eu Dirymu yn Unol â Phenderfyniad gan y Cynulliad (Y Weithdrefn Negyddol)
Instruments in Respect of which the Assembly is not Invited to Pay Special Attention under Standing Order 15.2 and Instruments Subject to Annulment Pursuant to a Resolution of the Assembly (Negative Procedure)

[2] **Janet Ryder:** Gwyn has been looking at SLC307, the Education (Free School Lunches) (Working Tax Credit) (Wales) Order 2009. Do you have anything to say on that?

[3] Gwelaf nad oes unrhyw beth i'w I see that there is nothing to add.
ychwanegu.

[4] Are Members content with that? I see that you are.

4.46 p.m.

Offerynnau y Bydd y Cynulliad yn Cael ei Wahodd i Roi Sylw Arbennig Iddynt o dan Reol Sefydlog Rhif 15.2 ac Offerynnau sy'n Agored i Gael eu Dirymu yn Unol â Phenderfyniad gan y Cynulliad (Y Weithdrefn Negyddol)
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[5] **Janet Ryder:** Joaneust has been looking at SLC304, the Marketing of Fresh Horticultural Produce (Wales) Regulations 2009.

[6] **Ms Jackson:** You may recall that this was adjourned from our last meeting, when the Government's response was not available. We have now received the Government's response on this, which has been circulated to you. You can see that it takes issue with the reporting point, claiming that the regulations have been made bilingually; it is only the labels that may be annexed in certain circumstances arising from the regulations that have not been required to be made bilingually. There are references to the Government's Welsh language scheme. Gwyn is our resident expert on Welsh language schemes, and he has kindly said that he will say a few words on that.

[7] **Mr Griffiths:** Mae'r rhain yn rheoliadau rhyfedd, gan eu bod wedi eu gwneud yn gyffredinol yn ddwyieithog, ond mae mân ddyfyniadau, sef cynnwys labeli, sydd i'w gwneud yn uniaith Saesneg. Mae gennych esboniad y Llywodraeth ynglŷn â pham mai dyna yw'r sefyllfa. Dyma'r math o **Mr Griffiths:** These are strange regulations, because, in general, they have been made bilingually, but there are some small sections here than there, namely what is to be included on the labels, that are to be in English only. You have the Government's explanation as to why that is the case. This is

beth sydd i fod yn Saesneg yn unig:

the kind of thing that is supposed to be in English only:

[8] 'The Rural Payments Agency is an Executive Agency of the Department for Environment, Food and Rural Affairs (Defra) acting in Wales on behalf of the Welsh Ministers'.

[9] Manion felly ydynt, gyda'r rhan fwyaf o'r wybodaeth sydd i fynd ar y labeli ar ffurf rhifau, dyddiadau neu logos. Felly, ni fydd gwaith cyfieithu i'r person a fydd yn rhoi'r labeli hyn ar unrhyw beth nad yw'n berthnasol. Mae mân ddarnau o'r fath mewn pedwar gwahanol reoliad. Dywed y Llywodraeth eu bod yn rhy gymhleth i'w cyfieithu. Nid wyf wedi cael fy hyfforddi fel cyfieithydd ond cymerodd 10 munud i mi gyfieithu'r cyfan, felly ni fyddwn yn cymeradwyo ymateb y Llywodraeth i'r pwyllgor. Ni welaf unrhyw reswm pam na all y rhain fod yn ddwyieithog.

They are bits and pieces of that nature, with most of the information for the labels being numbers, dates or logos. So, there will be no translation work for the individual who sticks these labels on anything that is not relevant. There are similar bits and pieces in four different regulations. The Government says that they are too complicated to translate. I am not a trained translator, but it took me 10 minutes to translate the whole lot, so I would not commend the Government's response to the committee. I see no reason why they should not be bilingual.

[10] **Janet Ryder:** Would any Members like to comment on this?

[11] **Alun Davies:** I find the Government's explanation singularly unconvincing. It probably falls foul of the legislation that it presumably wishes to introduce as a consequence of its proposed Welsh language legislative competence Order. I do not see how that explanation at all fits in with its general approach and policy.

[12] **Janet Ryder:** Gwyn, if we do not accept the Government's explanation, what will happen?

4.50 p.m.

[13] **Mr Griffiths:** The matter is presented to the Assembly in the usual way with the committee report and the Government response given separately.

[14] **Janet Ryder:** Therefore, do we just write back to the Government to say that we would expect these things to be translated?

[15] **Mr Griffiths:** Yes.

[16] **Janet Ryder:** Would the committee be content with that?

[17] **David Melding:** I think that that advice is very clear and that we should take action on it.

[18] **Janet Ryder:** With that caveat, are Members content with SLC304? I see that you are. Do you have any comments to make on SLC308, The Wildlife and Countryside (Registration, Ringing and Marking of Certain Captive Birds) (Wales) (Amendment) Regulations 2009, Joanest?

[19] **Ms Jackson:** As you will see, there is a reporting point there. It is a sort of technical drafting issue, which has arisen from the transfer and vesting of powers from the Assembly to the Welsh Ministers, and you will see that it is mentioned in the report that you have one

regulation that now refers to the National Assembly, which is defined in the principle regulations. Another part of the regulations refers to the Welsh Ministers, which, we consider, could have caused some confusion. The Government has responded with, in the circumstances, quite an acceptable response. It accepts that there could have been cause for confusion and it also accepts the other point made in the report, namely the suggestion that, given the brevity of the principle regulations and these amending regulations, such confusion could have been avoided by just consolidating the regulations. In the circumstances, I think that we can accept the Government's response and not require it to take any further action at present, because it appears that every breeder of birds affected by these regulations will, anyway, be contacted individually. Hopefully, the point is also now well made about the need to take account of the transfer of powers from the Assembly to the Welsh Ministers in this sort of circumstance, and that it will be taken on as a general point of wider and more general application.

[20] **Janet Ryder:** Are Members content with that? I see that you are. Thank you. In that case, we have finished with the pieces of legislation that we needed to consider and are ready to move on to the fourth item on the agenda. We are expecting the Minister for Rural Affairs, Elin Jones, and the Minister for Environment, Sustainability and Housing, Jane Davidson, to join us. They are not here at present. They are due to join us at 5 p.m., so we will have to adjourn for eight minutes until they arrive. Thank you.

*Gohiriwyd y cyfarfod rhwng 4.53 p.m. a 4.58 p.m.
The meeting adjourned between 4.53 p.m. and 4.58 p.m.*

Y Mesur Morol a Mynediad i'r Arfordir Marine and Coastal Access Bill

[21] **Janet Ryder:** I thank both Ministers for attending committee today. We are looking at the Marine and Coastal Access Bill, which, of course, covers the two portfolios. We have questions on the Bill that cover both portfolios. I welcome the Minister for Rural Affairs, Elin Jones, and the Minister for Environment, Sustainability and Housing, Jane Davidson. Would you please introduce your officials for the Record? Minister for Environment, Sustainability and Housing—this will be a very long meeting if we use the full title each time—would you like to introduce your officials?

[22] **The Minister for Environment, Sustainability and Housing (Jane Davidson):** Yes. With me are Rachael Clancy, who will provide legal advice, Tamsin, who is from the marine consents unit, and Louise, who has been the Bill manager.

[23] **Janet Ryder:** Thank you, Minister. Minister for Rural Affairs, would you like to introduce your officials?

[24] **The Minister for Rural Affairs (Elin Jones):** With me are Stuart Evans, who is responsible for fisheries policy, and Sean Bradley, who is a lawyer in my department.

[25] **Janet Ryder:** Thank you. We have a number of questions for you. I will start by asking a question to both of you. A number of sections in the Bill give the Welsh Ministers regulation-making powers. Does the Bill achieve the correct balance between the powers on the face of the Bill and the powers given to the Welsh Ministers to make regulations? Minister for the environment, would you like to start us off?

5.00 p.m.

[26] **Jane Davidson:** We are very happy with the provisions in the Bill. It is a framework Bill and is already a complex piece of legislation. It ensures that provisions are flexible

enough to accommodate current and future requirements in Wales and to provide legislatures with the appropriate level of scrutiny.

[27] **Elin Jones:** I am equally happy, on a similar basis.

[28] **Janet Ryder:** Are there any powers that could have been delegated to the Welsh Ministers as a result of this legislation that have not been included in the Bill?

[29] **Elin Jones:** The answer from the fisheries side is 'no'. We are content with the powers that will be made available to us, which will enable us to meet the requirements of our current policy framework and our major plans to undertake quite a significant change in fisheries management and enforcement in Wales.

[30] **Jane Davidson:** As a result of discussions during the pre-legislative scrutiny, the Welsh Ministers will now become the marine planning authority for the Welsh offshore region to match its fisheries responsibilities. So, we are happy with those discussions.

[31] **Janet Ryder:** Finally, for my set of questions, could you explain whether any discussions were had with the UK Government on conferring legislative competence on the Assembly in the areas of marine licensing and marine nature, conservation and fisheries, and why, ultimately, the functions were given by way of executive powers with the exception of the coastal access?

[32] **Jane Davidson:** In a sense, that is the normal relationship: devolving powers to Wales devolves powers to Ministers. If we compare that with the proposed LCO on the environment, for example, we see that that looks to give legislative responsibility to the Assembly to reflect the executive powers already held by Ministers. So, the normal relationship is to devolve executive powers. We have had discussions on the devolution of executive powers across the whole of the UK—Scotland, England, Northern Ireland and Wales—in the context of the Bill.

[33] **David Melding:** When you have negotiations with your colleagues in Whitehall, the model that you suggest for framework powers is that those powers come directly to Ministers and that we do not use the provisions of the 2006 Government of Wales Act to pass on legislative powers to the legislature, which it can then pass, as it wishes, to Ministers?

[34] **Jane Davidson:** From my perspective, David, that is done on a case-by-case basis. I had early forays in, considering whether that would be an opportunity with this Bill. However, given that this Bill applies to the four nations, that it looks at complex and differential devolution arrangements, and that we all want to achieve the same outcome, namely the greater strategic management of our seas, we were content that it was appropriate for executive functions to be devolved in the Bill. However, if we were looking at a Bill that applied only to England and Wales or that was unique to Wales, we would always seek legislative functions. I have always made the case that we put forward the proposed LCO on the environment to ensure that the legislature had the functions to reflect the executive functions that the Ministers already had.

[35] **Alun Davies:** I understand the point that you make, Minister, but is it not a somewhat cumbersome way of going about things? In many ways, I agree very much with what you said about the proposed LCO on the environment. Those powers are needed in this place to reflect the executive powers that you hold as a Minister. However, would it not be a cleaner way of working if those legislative powers were devolved at the same time as the executive powers? That would enable you to make any such changes as you may require in the future as you learn from the experience of using these new executive powers, without needing to revisit either this place or Westminster using the LCO process. Although that process is working

more smoothly now than it was a year or two ago, it is still quite a long process for devolving powers. So, would it not be cleaner and easier to do it through this sort of legislation?

[36] **Jane Davidson:** I suppose that if you took a kind of reductions agenda, that would be the case. However, we are here to look at a particular Bill. In fact, one could argue that the cleanest way of doing it would be via a ‘yes’ vote in a referendum, because then the National Assembly would have broad legislative competence to pass Measures on the subjects listed in Schedule 7 to the Government of Wales Act 2006, but if you do it through the legislative competence route, you will always have individual exceptions carved out of the fields in Schedule 5.

[37] **Alun Davies:** I appreciate that, Minister. I know—[*Inaudible.*]—on these issues. As for how we devolve legislative competence, we have the LCO process and we have a public Bill process. The public Bill process will always be easier than the LCO process because it is simply more straightforward in parliamentary terms. I am interested in why the Ministers seek executive functions in the way that they do. I think that those functions are absolutely necessary and desirable, but you do not then seek the legislative competence to amend and change those powers as you learn how you use them. To me, that would seem to be a more straightforward way of creating the new means of strategic management that you spoke about.

[38] **Jane Davidson:** I return to the same point, which is that this Bill covers all parts of the UK. That is a critical element in the discussion on this one in particular. During the early discussions, I suggested that we look at legislative powers alongside the other clauses, but there was very little appetite for that. It is interesting that colleagues in Scotland and Northern Ireland, as well as in England, feel that it is more important at this point to get the structure right to deliver this piece of marine legislation, which has been called for for some 30 years. In fact, we can apply for legislative powers at a later date. If we apply for them in the context of a legislative competence Order related to this Bill, it would be very clear what would be devolved, or, subject to the successful outcome of a referendum, these issues of what would be carved out in Schedule 5 would disappear.

[39] **Elin Jones:** The same issue also applies to my parts of the Bill. I have reflected on this, because the issue was raised during the debate on the policy aspects of the Bill, and I cannot identify a policy imperative that requires the legislative competence to be here at this point in time or in the foreseeable future. I understand the point that you are making, but my response would be similar to that of the Minister for the environment: the cleanest and clearest way for all concerned, especially lawyers, would be to have a referendum. That would clearly define the legislative competence.

[40] **Jane Davidson:** To clarify, if there were to be a ‘yes’ vote in a referendum, the National Assembly would have legislative competence to pass a Measure in relation to Wales that made provision in similar terms to those of the Marine and Coastal Access Bill. The National Assembly could pass a Measure on marine matters, covering marine spatial planning, marine licensing, marine conservation zones, coastal access, enforcement, and fisheries issues, and it could also deal with waste, pollution, nuisance and more.

[41] **Janet Ryder:** If you are satisfied with those answers, we will now move on to Mike German, who has the next set of questions.

[42] **Michael German:** I will come back in some detail on this in a moment, but, first, I want to start with some technical aspects in relation to clause 41 of the Bill. This question is for Elin really. Is there a timescale for an Order establishing the Welsh zone?

5.10 p.m.

[43] **Elin Jones:** We are working to a timescale of implementation by 1 April 2010. We are in discussions with the Wales Office about implementing the transfer of functions Order in the weeks and months following Royal Assent. We are confident that we can keep to that timescale, according to the information currently available to us.

[44] **Michael German:** You have predicted my next question, which was on the transfer of functions Order. Does that mean that the transfer of functions Order in relation to the area of the Welsh zone beyond the seaward boundary of the territorial sea will be completed at the same time as the Order establishing the Welsh zone?

[45] **Elin Jones:** Yes, we are working to that timescale. The transferral of functions will have been completed by, or concurrently with, 1 April 2010.

[46] **Michael German:** Thank you. I have written the date down. That is very helpful.

[47] Returning to executive and legislative competence, I understand what Jane says about there being no appetite, but given that the other administrations already have, or will have, the competence, without it actually being devolved to them by another route, they would automatically accept that they have this competence. Are you entirely satisfied that your ability to legislate under your existing executive competence gives you sufficient power to legislate on the territorial sea areas around Wales?

[48] **Jane Davidson:** Yes.

[49] **Michael German:** So, there would be no case for you doing this differently.

[50] **Jane Davidson:** Subject to this legislation passing through the parliamentary process, we will acquire a range of new powers, as has already been reported to you in committee. The Bill gives the Assembly Government substantial new powers, which will enable us to determine what we wish to do in exercising those functions.

[51] **Michael German:** Are there any powers in the area of waste, for example, that you feel might have been delegated but that have been excluded?

[52] **Jane Davidson:** No. When we started the process for the proposed LCO on the environment, the Marine and Coastal Access Bill had not yet started its pre-legislative scrutiny, so we had discussions with the UK Government about taking out some of the elements to do with waste in relation to the sea from the proposed LCO so that they could be more properly and holistically dealt with in the Marine and Coastal Access Bill. Let us take for example an area that I know you are interested in, namely responsibility for waste litter between high and low water. The waste competence to be conferred by the proposed LCO extends to the mean low water mark, while, in the Marine and Coastal Access Bill, it extends from the mean high water spring tide. We therefore have an overlap in functions rather than a gap.

[53] **Michael German:** Without getting too complicated, between the Government of Wales Act, this Bill and your proposed LCO, Wales is defined three times. You have referred to two definitions in your evidence to the Legislative Committee No. 4, and now we have three. There is the extended definition in relation to the sea under the Marine and Coastal Access Bill, the definition under the Government of Wales Act 2006, and the restricted definition in the proposed LCO on the environment. The difficulty now is that, with three boundaries for Wales, the line between executive competence and legislative competence will be much more confused and increasingly complicated. If your proposed LCO on the environment proceeds, it seems to me that the Assembly will be able to legislate—and not by using executive powers—to deal with people who throw litter from the beach into the sea, but

not to deal with those who dump litter at sea. Could you reassure us that you will find a way around this conundrum?

[54] **Jane Davidson:** In a sense, I want to give you the same answer as I did a moment ago, namely that there is no gap but there is an overlap in the competences. I am informed by our legal advisers that it is adequately addressed through our competence. Do you want to add anything, Rachel?

[55] **Ms Clancy:** The Marine and Coastal Access Bill is not directly related to waste. However, the licensing provisions of the Bill create an offence for any substance or article to be deposited without a licence in the marine area. It means that, if anyone deposits litter, for example, from a vessel in the territorial sea without a licence, they will be committing an offence. Welsh Ministers have power under the Bill to establish a civil sanctioning regime so that they can impose fixed and variable monetary penalties on people who carry out this activity.

[56] **Michael German:** To use the example that you used earlier, if we had the legislative power we might have been able to do this in a different way altogether, which might have suited our circumstances. I want to test the notion that you referred to earlier, Jane, about the appetite for trying to do something when three administrations have not necessarily been interested in seeing this happen. Is that the real reason why it would not be possible to amend the Bill to give us more legislative competence—that you did not have a range of support around the table?

[57] **Jane Davidson:** I have nothing to add to my previous answer, which is that the point of the Marine and Coastal Access Bill is to reflect complex devolutionary arrangements across the UK, but that it also aims to put policy together in a coherent way across the UK. Therefore, I have been heartened by my discussions with the UK Government and Scottish and Northern Ireland Ministers in this context. We have the best outcome at this time, and the important point is that, if the Assembly chooses to seek legislative competence in this area, which I would strongly support, there are two mechanisms for the Assembly to do that if we have a successful referendum.

[58] **David Melding:** I have some questions on marine licensing, which relate to the Minister for Environment, Sustainability and Housing. Section 63 introduces a new enabling power for the licensing authority to add or remove any activity from the list of activities that require a marine licence. However, there is no duty to consult prior to making an Order under section 63. Should such a duty have been included, as is the case under section 71 in relation to exempting activities from the need for a licence?

[59] **Jane Davidson:** This is a very good point, David. We also think that this may have been an oversight, so it is very helpful that it has been identified. It would always be our intention to consult, but it is important in this context that the duty is reflected in the same way.

[60] **David Melding:** That is a clear answer, which greatly helps our scrutiny. Section 64 allows the licensing authority to set the fees associated with applying for a marine licence. Such a fee is determined by or in accordance with the regulations made by Welsh Ministers. Such delegated legislation is subject to the negative resolution. Is the negative resolution an appropriate procedure under section 64? We are concerned about the setting of fees.

[61] **Jane Davidson:** I will bring Tamsin in here, because the Assembly Government has brought all the marine consents together in one place so that we can have a strategic and co-ordinated area of work.

[62] **Ms Brown:** On the negative resolution, having spoken to our Department for Environment, Food and Rural Affairs counterparts, we understand that this is a standard procedure for the setting of fees. The negative procedure is used because it is likely that the fees will be reviewed fairly regularly, possibly annually, so it was felt that the negative procedure was probably the most appropriate and proportionate response to that. It is a standard procedure.

5.20 p.m.

[63] **David Melding:** It is for us to reflect on that, but we think that the area of fees needs careful consideration. I note the methodology behind your response.

[64] Let us look at sections 91 to 93, which introduce enabling powers to allow a licensing authority to confer on a designated enforcement authority the power to impose fixed or variable monetary penalties. These sections, together with Schedule 7, set out the detail. Is there a danger that, by failing to set out the detail of the powers to impose fixed or variable monetary penalties, which are fines, in effect, on the face of the Bill, there will be a significant difference between the regimes that will apply in England and Wales?

[65] **Jane Davidson:** Schedule 7 lays out the details on such things as cost recovery and consultation requirements, but the Bill requires flexibility, so that each administration can establish a civil sanctioning regime to suit the needs of the area. Therefore, it is certainly feasible that we end up with a situation in which we have different sanctions, but our intention is to work with other administrations across the UK to establish a joined-up and streamlined licensing regime. That includes the civil sanction regime, because we will be dealing with industries that operate on a UK basis, and we want to provide consistency whenever possible. These provisions are subject to the affirmative procedure, so they will have the appropriate scrutiny in Wales.

[66] **David Melding:** So, you do not foresee huge differences, unless there is a particular need.

[67] **Jane Davidson:** No.

[68] **David Melding:** Section 95 introduces a new enabling power for the Welsh Ministers to delegate any of their licensing functions, as defined by section 95(4) and section 95(5), to another body. There are a number of exemptions in section 95(6); I will not read them all out. Are there any licensing functions that could have been delegated under section 95, but have not been?

[69] **Jane Davidson:** My understanding is that there are not, but it is not the intention to delegate any of these functions to another body, because we have set up the marine consents unit as the first port of call. There are similar arrangements in the other administrations so that they can now talk to each other in a completely coherent way.

[70] **David Melding:** Are there any functions that can be delegated under section 95 that you feel should remain with Welsh Ministers?

[71] **Jane Davidson:** In a sense, we are saying the same thing, because the marine consents unit will act on behalf of Welsh Ministers. So, those functions remain here but are delivered in a delegated fashion through the marine consents unit.

[72] **Ms Clancy:** To clarify, the functions under section 95(6) that cannot be delegated under the terms by which the Bill is currently drafted comprise subordinate-legislation-making functions. So, technically speaking, from a legal standpoint, the Bill could have

provided for those functions to be delegated, but it was decided, as a matter of policy, that those functions should remain with the Secretary of State, or Welsh Ministers in the case of Wales.

[73] **David Melding:** This is my final question on this issue. Section 105, in essence, relates to appeals processes. Should the requirements for an appeals system be set out on the face of the Bill? Would that not be clearer, as, again, it is an important area when we look at fines and appealing against those penalties? Why is so much latitude given, and would it not be better to set it out on the face of the Bill?

[74] **Jane Davidson:** The Bill provides Welsh Ministers with the flexibility to make regulations for an appeals procedure that meets our requirements. We will want to ensure that we have the appropriate appeal procedure. It is also important to state that, in the context of setting something out on the face of the Bill, the procedure will be different, because of devolution and organisational structures, so it would be hard to set it out in exactly the same way on the face of the Bill. In Wales, Welsh Ministers will be responsible for granting licences, whereas, in England, the Secretary of State has delegated that function to the new marine management organisation.

[75] **David Melding:** To follow up on that point, we can understand that the mechanics of devolution require the system to be varied to reflect that, but do you envisage that the appeals procedures are likely to differ considerably in England and Wales? I assume that it is not a policy intention.

[76] **Jane Davidson:** There is no policy intention. As I said in answer to an earlier point, many organisations that will be looking for licences will be operating across the UK. We do not want action to be taken under the marine Bill to frustrate proper delivery, but we also want to be sure, since this is the first piece of major strategic legislation of its kind, that we have not fettered our discretion for the future where we need to exercise that appropriately for Wales.

[77] **Michael German:** I would like to ask Jane about some of the clauses that have no parliamentary procedure. This may relate to something that will be different in UK Parliament procedures, because of the way that it is described. Sections 113 and 130 have no parliamentary procedure attached to them. However, in England, an amendment to something that has gone through a parliamentary procedure will have some level of parliamentary scrutiny. Do you think that it is appropriate that there should be no parliamentary procedure, or will you seek to change that?

[78] **Jane Davidson:** I assume that you are referring to the designation of marine conservation zones.

[79] **Michael German:** Yes.

[80] **Jane Davidson:** Marine conservation zones are designated by local Order, which would be subject to extensive public consultation beforehand. We think that it is appropriate that no procedure applies to the Order, because it would be made under the clear provisions set out in the Bill. With the exception of where urgent action is needed, it would always be made after consultation. Under clause 122, we can amend or revoke the Orders by a further local Order. These procedures are consistent with the designation of other nature conservation sites, which I think is very important. Special areas of conservation, sites of special scientific interest and marine nature reserves are all designated in that way. Conservation Orders for the protection of those sites will also be made by local Order following consultation, which is why clear procedures for the exercise of these powers are laid out on the face of the Bill, but no procedure applies.

[81] **Michael German:** Therefore, sites of special scientific interest, marine nature reserves and so on will have no parliamentary procedure whatsoever.

[82] **Jane Davidson:** That is correct.

[83] **Michael German:** Is it appropriate?

[84] **Jane Davidson:** You make it sound as if it is a negative element, whereas we believe that the clear provision set out in the Bill will guide all of the action in exactly the same way as is carried out at present with the special designations.

[85] **Michael German:** Is there any difference between how this will apply in England and how it will apply in Wales?

[86] **Jane Davidson:** No.

[87] **Ms Clancy:** There is no difference.

[88] **Jane Davidson:** There will be no difference in Scotland either.

[89] **Ms Clancy:** To clarify, in England, the provision that will be made in Wales by a conservation Order will actually be made by bye-laws made by the MMO. Those bye-laws would be subject to confirmation by the Secretary of State. The provision that will be made in conservation Orders is exercisable in precisely the same manner, subject to the same constraints, apart from the requirement for them to be confirmed by Welsh Ministers, as they are the authority making them. That is why, in the Bill, conservation Orders are termed in that way because they are being made by Welsh Ministers, whereas, in England, they are termed bye-laws because they are made by a non-government department and are subject to confirmation by the Secretary of State.

[90] **Jane Davidson:** In a sense, that is the fundamental difference in the management of this issue: we are not setting an arm's-length organisation to do it, because Welsh Ministers are delivering the policy.

[91] **Janet Ryder:** Do you have another question, David?

[92] **David Melding:** Section 132 allows you to make interim Orders for what may then be declared marine conservation zones. The English practice is that the Minister will have to decide whether to make a MCZ Order, whereas, according to the way it is currently drafted, the Minister will have to make that decision within a year or rescind it. You can just extend the interim Order indefinitely and not make a decision on the marine conservation zone. Why is there this difference between what Welsh Ministers and English Ministers would be permitted to do with interim Orders and their extension?

5.30 p.m.

[93] **Jane Davidson:** In a sense, this is an extension of the previous answer, because it is about setting up the appropriate arrangements, where Welsh Ministers will be both the designated authority for marine conservation zones and the authority making conservation and interim Orders. In England, the Secretary of State is the designating authority, and the MMO is the authority making conservation and interim bye-laws. The substance of the difference relates to the length of time for which an interim Order can remain in force. As you have said, an interim bye-law can remain in force for a maximum period of 12 months. However, if the Secretary of State intends to designate any of the areas identified in the

interim bye-law as a marine conservation zone, the Secretary of State then has the power to direct that the interim bye-law remains in force until a decision is made about whether to designate or until the area is in fact designated, however long that may be.

[94] In Wales, because Welsh Ministers will be both the designating authority and the interim Order-making authority, the continuing duty to keep under review the need for an interim Order to remain in force will include consideration of whether the Welsh Ministers propose to designate the area as a marine conservation zone. Therefore, although the provisions are drafted differently in order to reflect the different arrangements, the intent is the same.

[95] **David Melding:** Is it possible for interim Orders to be extended indefinitely?

[96] **Ms Clancy:** Technically speaking, and perhaps in legal theory, yes. However, all powers conferred by a Bill must be exercised according to general administrative law principles. So if the Welsh Ministers made an interim Order and then simply forgot about it or had no intention of ever designating the site concerned, the decision not to designate or, perhaps after the expiry of however long, the decision not to revoke the interim bye-law, would be subject to challenge on grounds of, possibly, an abuse of power—if the Order was made with no intention of ever designating the site—or perhaps on grounds of a failure to have kept under review the need for the Order to remain in force.

[97] **David Melding:** I still do not understand why there are different systems for the way that the English are going to do it and the way that you propose to do it in Wales. Obviously, you have gone through certain process issues with regard to the functions of Welsh Ministers. However, there is no Parliamentary procedure on these systems, and the danger is that, by passing an interim Order, you will not have local scrutiny and consultation and you could run an interim Order for several years before there was any prospect of a legal challenge. Is that not the case? Local communities could feel very disadvantaged without any recourse through an Assembly procedure.

[98] **Jane Davidson:** There is a continuing duty to keep under review the need for the interim Order to remain in force. As Rachael said, theoretically, in the English context, because of the way that the legislation is framed, the Secretary of State has the power to direct that the interim bye-law remains in force for however long, until a decision is made about whether to designate or until the area is designated. Therefore, the point about the duty to keep under review the need for an interim Order is a very important aspect of this process.

[99] **David Melding:** I think that I have gone as far as I can with that.

[100] **Alun Davies:** I will move on to clauses 138 and 140, and Schedule 10. These parts of the legislation will enable you to make Orders conferring powers to issue fixed monetary penalties where an offence is committed under the provision of an Order. Do you feel that there should be a bit more detail on the face of the Bill on how these penalties will be operated?

[101] **Jane Davidson:** I do not think that we need any more detail on the face of the Bill, because it sets out the procedures for appeals and consultations, as we discussed earlier. There is an important protection in the system in the sense that the provisions are subject to the affirmative procedure and, therefore, the scrutiny of the National Assembly.

[102] **Alun Davies:** In reply to previous questions on areas where the processes introduced changes between Wales and the rest of the United Kingdom, you said that it is not your intention to create any significant differences between the devolved administrations but simply to administer your responsibilities in a different way. Is that your intention in these

clauses too?

[103] **Jane Davidson:** Absolutely. As I have said previously, it is not our intention to take different action. There could be differences. This would be consistent with other legislations and would provide flexibility for Wales to develop a regime suitable for Wales. There could be, because of the use of the affirmative procedure, propositions to future Ministers about the way in which this should operate, which would mean that there would be a difference, but it would be a difference to improve a proposition. That is the point about our not fettering our discretion but reflecting our administrative arrangements for delivery and ensuring that we have the right tools in the toolbox to take forward our obligations under the Bill.

[104] **Alun Davies:** On the power of Ministers in relation to fisheries—and I assume that this question is for the Minister for Rural Affairs—clause 180 enables Welsh Ministers to make by Order any provision that inshore fisheries and conservation authorities can make by bye-law under clause 151, but only to the extent that the Welsh Ministers do not already have that power. Clause 180(2), if I have read it correctly, is quite ambiguous. I am particularly thinking of the word ‘kind’ appearing in the following,

[105] ‘to make provision of the kind referred to in subsection (1)’.

[106] Are you comfortable with that wording? Are you satisfied that Welsh Ministers will be able to make the same provision in Wales as IFCA will be able to make in England?

[107] **Elin Jones:** I believe that the clause has been carefully considered and worded. It relates to the requirement for us to be clear about where the powers are derived from and about there not being any duplication in the ability to obtain powers from other Acts of Parliament, or this Bill when it becomes an Act. So, the wording, and the reference to ‘of the kind’, is there for a purpose. It is not there to be ambiguous; it is there to be clear about where the power is derived from. For lawyers it is clear, I understand.

[108] **Alun Davies:** Clearer for politicians, possibly.

[109] **Mr Bradley:** This reference to ‘of the kind’ is quite a technical drafting point. In the version that I have, clause 184 is meant to be a default power. So, where the Welsh Ministers do not have powers under other legislation, they can use this to do, effectively, what IFCA will be able to do.

[110] On the reference to powers, ‘of the kind referred to’, we have to look back to see what the IFCA can do and, in clause 156, there is quite a long, indicative list of the types of things that IFCA can do. It is set out in fairly general terms. So, the reference to provisions ‘of that kind’ is appropriate in these circumstances. There is not going to be other legislation that sets out in exactly these terms that the Welsh Ministers can do these things elsewhere, so it is meant to capture this idea that, if we have broadly equivalent powers elsewhere, we use them and if we do not, we use clause 184. We have considered it in detail and we are satisfied that it should not leave any gap and that it gives the Welsh Ministers the powers that they need. So, we are satisfied with it.

[111] **Alun Davies:** I accept your satisfaction, but we have been told at other times that where powers are being transferred to Welsh Ministers, we have to be very precise about the extent and use of those powers, because any vagueness or any sense that those powers are not properly defined might lead to legal challenges in the future.

5.40 p.m.

[112] **Mr Bradley:** I cannot comment on that in a wider context, but in relation to this

particular issue, the Office of the Parliamentary Counsel, which has drafted the Bill, has sought to use a shorthand way of making sure that there are no gaps and that nothing is overlooked. The alternative would have been to identify every power that Welsh Ministers would be exercising under every other part of fisheries legislation, and to perhaps list that and say, 'Where you cannot use that, you can use this.' It is a shorthand way of achieving that. As I say, we are satisfied that it will work and that it will not leave gaps, and that Welsh Ministers are not somehow going to fall short of being able to do what an IFCA could otherwise do.

[113] **Alun Davies:** Minister, on your use of the powers that will be conferred on you within this legislation, do you foresee any legislation being enacted in Wales as a consequence of the Bill that would follow a different timescale to equivalent legislation in England? Do you foresee any difficulties if you propose legislation according to a different timescale? Do you consider that that could lead to problems with the legislative boundaries, if you like, between England and Wales?

[114] **Elin Jones:** With any legislation, or changes to legislation, that a Welsh Minister is considering and that impact on a maritime boundary, the need to consult with England, the Isle of Man, or whoever it may be, is paramount. It is wholly necessary to do that with legislation that can have an effect on another side of the boundary. It is particularly important to do that with seas and rivers.

[115] The policy decision taken by England has been to introduce its IFCA's in 2011 rather than in 2010, which is the implementation date that we are still working to in order to bring the responsibility for fisheries management and enforcement into the Assembly Government. So, that will work to a different timescale. We are working with our English counterparts on memoranda of understanding on areas that may well need to have an interim process in place before being implemented in England.

[116] **Alun Davies:** Moving on, clause 284 of the Bill introduces powers to apply fixed administrative penalties to domestic fisheries. We have heard already this afternoon that, where those penalties have been introduced in other areas, you have used the affirmative procedure. I understand that the delegated legislation is subject to the negative resolution. Are you content that that is the appropriate procedure for legislation under clause 284?

[117] **Elin Jones:** Yes, I am content that negative resolution is the most appropriate way of dealing with this clause. I would reiterate the point that I made in my previous answer, which is that, in respect of financial penalties for fisheries' breaches of legislation, we need to have a close relationship with other fisheries enforcement areas in England or the Isle of Man in order to ensure that our penalties do not differ significantly, because there are people out there who will always go to where the penalty is lowest. Having a good understanding between Ministers in Wales and those in other parts of the UK as to where the penalties should lie is key. The negative resolution allows that to happen most appropriately.

[118] **Alun Davies:** Part 9 of the Bill, which relates to coastal access, places a duty on the Secretary of State and Natural England to secure a long-distance route around the coast of England. With regard to Wales, you follow the route of conferring legislative competence on the Assembly in order to introduce a proposed Measure subsequent to that competence being granted. Following on from our earlier conversation about these matters, I am interested in why you felt that creating a new legislative competence in these fields was the most appropriate way forward, because it would surely have been easier had we simply placed this legislation as part of the Bill.

[119] **Jane Davidson:** There are two reasons why we did what we did. It is important for me to say that I am happy with the legislative competence that comes under this part of the

Bill. We were the only administration in the United Kingdom that had already announced, as a manifesto commitment, the desire to create a coastal path. We had not only already started the work on delivering that coastal path, but had a timescale for it. The intention is that the coastal path will be complete by 2012. We were the only administration that had already put in additional funding. I did not want the coastal path approach that is being taken in the context of the legislation—which is different to our coastal path approach—to lead to us ending up in a situation where we would perhaps have slower development of our coastal path because of the fact that we were going to take legislation that would potentially change the parameters for its delivery. We would need to go out to formal consultation before we did that. So, all of this was going to arrest the development of our carefully negotiated coastal path approach. By giving the Assembly legislative competence in this area—effectively because we will be putting a Measure forward, or a subsequent administration would put a Measure forward—I would anticipate that such a Measure would be likely to come forward as an imperative only if we have problems delivering our outcomes in terms of the coastal path. If not, then it remains a legislative opportunity for an Assembly in the future.

[120] **Alun Davies:** I agree wholeheartedly with the policy objective here, Minister; I am just curious about the route that has been taken. Surely the cleanest, most efficient and most timely way of doing this would have been to create this through a Westminster Bill, in this public Bill, and then enabling the Assembly Government to use those powers immediately upon Royal Assent being given for this legislation. Now, if we have to go through a process of legislating here, it will take more time.

[121] **Jane Davidson:** The point that I thought that I had just made is that the most timely approach in the context of delivery is to continue to achieve our all-Wales coastal path by 2012. We felt that we would not have achieved that in the context of taking powers on the face of the Bill, because we would then have to deliver the duty, consult, manage and so on. We might have ended up in a situation where there were legitimate concerns about the approach being taken. By taking the approach that we have taken, we are confident that we will get our all-Wales coastal path. However, as I said, if it turns out that there are difficulties in achieving that, then an Assembly in the future can utilise the framework powers.

[122] Framework powers are only appropriate if you do not want to do something immediately. That is a very important issue. Framework powers sound like a good proposition, but then they have to go into the Assembly's own legislative cycle and be prioritised accordingly. The importance here is that having a legislative tool, as I have described it before, in terms of coastal access is extremely useful for an Assembly, to know that it can legislate in the future on this issue. However, if the outcome is to get a high-quality coastal path around the whole of Wales and be the first part of the UK to do that, our delivery mechanism, including the additional finance, will deliver that quicker.

[123] **Alun Davies:** Thank you, Minister. I do not disagree with that approach. However, we hear different Ministers saying very different things about these issues with regard to seeking legislative competence. As we have heard already this afternoon, we do not seek legislative competence because we have no plans to use it, and then we seek it even though we do not want to use it. We detect, as Members, that there is a different approach in different departments throughout Government. I do not see any consistency. However, I will not dwell on that this afternoon. Can I take it from your answers that you do not have a timescale for introducing the proposed Measure and that you see these as reserve powers rather than powers to use immediately?

5.50 p.m.

[124] **Jane Davidson:** I think that it would be a misrepresentation of the Assembly Government to say that different Ministers are doing this differently, as though it is all about

individual choice. This is done on a case-by-case basis to consider what is most appropriate with regard to the individual Minister, the policy objective and the agreed policy of the Assembly Government. The same would happen in Westminster in terms of what went into Bills in the first place. Legislation is a tool and I see the coastal access framework provisions as a reserve power, which an Assembly may choose to exercise in the future. However, if we achieve our intent, namely our coastal access route, with little difficulty by 2012, it may be that a future Assembly would not feel the need to prioritise such powers in the short term.

[125] **Alun Davies:** I have an additional question on that. Could these powers have been used to inhibit a coastal path in any way? If, in 2011, the elected Assembly decides that it is not fond of the coastal path idea—and the Minister for Rural Affairs and I have been lobbied quite fiercely in Ceredigion on this matter—a future Government could use exactly the same powers that you propose to use to create it, to inhibit or to frustrate it.

[126] **Jane Davidson:** The coastal path is being achieved using current legislation—

[127] **Alun Davies:** However, a new Government could change that.

[128] **Jane Davidson:** This is new potential legislation, in terms of the increased powers. I think that we will have to write to you on that.

[129] **Alun Davies:** I accept that I am no lawyer, but matter 16.2 enables Assembly Measures to be made in relation to the securing of access to certain relevant land for the purpose of open air recreation. Surely that can be used in more than one way, because it is an enduring and continuing power; it does not define the nature of future legislation, but creates a place for that legislation to take place. So, that could be used in a negative as well as a positive way.

[130] **Jane Davidson:** As I said, we will write to you on that, because we will need the lawyers to consider that issue.

[131] **Janet Ryder:** On the amendments of Harbours Act 1964, once the Bill becomes law, any Orders that fall from that Act will be subject to the negative procedure. Is that the case?

[132] **Jane Davidson:** Orders made under the Harbours Act are not subject to parliamentary or Assembly procedure, so the provisions of the Bill do not alter the procedure for making harbour Orders. The provisions enable the appropriate authorities to delegate the power to make an Order to another body. It is the delegation that is subject to the negative procedure, and that would appear to be appropriate.

[133] **Janet Ryder:** Are you aware of any amendment to the Bill that will affect any of the delegated powers that we have considered today?

[134] **Jane Davidson:** I will refer you to our Bill manager.

[135] **Ms George:** No; we are not aware of anything.

[136] **Elin Jones:** There is the possibility of an amendment that would allow Welsh Ministers to create Orders varying existing future shellfishery Orders made under section 1 of the Sea Fisheries (Shellfish) Act 1967.

[137] **Janet Ryder:** So, you are aware of the likelihood of that being passed.

[138] **Mr Evans:** That was discussed last week during Committee Stage in the House of Commons and it is being deferred back to Report Stage. It is an ongoing issue on which we

are working with DEFRA.

[139] **Janet Ryder:** It can be an issue when Bills go through, because it is about finding the right mechanism to allow proper scrutiny of those matters, especially when the amendments are brought through that may affect powers that are going to be transferred here.

[140] Finally, Ministers, in England there are various duties placed on IFCA's, for example, to manage the exploitation of sea fisheries, to exercise its power to seek to ensure that the conservation objectives of any MCZs in their district are furthered, as well as various reporting duties. In Wales, no similar duties are placed on Welsh Ministers. Should duties be placed on Welsh Ministers under the Bill, in particular to report to the Assembly on any of those issues?

[141] **Elin Jones:** In terms of duties for fisheries' functions, no, I do not believe that there should be duties on Welsh Ministers. If we were looking, through this Bill, to create a third-party body in Wales, it could well be appropriate for a Welsh Minister to place a duty on a third-party body, but because that is not the policy intention of the Bill, I do not believe that it is appropriate for duties to be placed on the Welsh Ministers regarding fisheries. On the issue of reporting, in England, the Secretary of State will report to the UK Parliament on the work of the IFCA's every four years; because the functions are being exercised directly by the Welsh Government, then the Welsh Government and Welsh Ministers are accountable almost every day of the week to the National Assembly, so I do not think that it is necessary to put something on the face of the Bill on this. However, I have given a public commitment to the Countryside Council for Wales, and I will give it to this committee as well, that I think that it is appropriate that Welsh Ministers should produce an annual report on their fisheries' functions for the National Assembly. I do not think that that needs to be on the face of the Bill; that is a policy decision of this Government here and it could be challenged by future Assemblies or future Welsh Governments.

[142] **Janet Ryder:** Do any members of the committee have any further questions? I see that they do not. I thank both Ministers. Is there anything further that either of you would like to add about this Bill? I see that there is not. I thank you both for coming to committee and for answering our questions. A draft transcript will be issued that you can check before the final version is published. We look forward to receiving a written note from the Minister for environment, clarifying that point about the future use of any of the powers that might be transferred. Thank you.

5.58 p.m.

Cynnig Trefniadol Procedural Motion

[143] **Janet Ryder:** It is now very close to 6 p.m.. We do not have any further agenda items, apart from considering matters that might arise out of this.

[144] I move that

the committee resolves to exclude the public from the remainder of the meeting in accordance with Standing Order No. 10.37(vi).

*Derbyniwyd y cynnig.
Motion agreed.*

*Daeth rhan gyhoeddus y cyfarfod i ben am 5.58 p.m.
The public part of the meeting ended at 5.58 p.m.*

